No. 92-1792

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

RONALD R. HELINSKI,

Petitioner,

v.

LEON A. ROSENBERG,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Maryland Appellate Court err in finding a Qualified Privilege to protect the defamer without balancing the public's right to knowledge of this court proceeding, with the father's right to protect his reputation and good name, in this case not involving "public concern"?

PARTIES TO THE PROCEEDING

The parties to the proceeding are the parties listed in the caption to the case, namely, Ronald R. Helinski and Leon A. Rosenberg.

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PETITION FOR WRIT OF CERTIORARI

Written Opinions were filed by the Circuit Court for Baltimore City; The Court of Special Appeals of Maryland; and The Court of Appeals of Maryland.

The jurisdiction of the Supreme Court of the United States is involved because the law expressed in the Court of Appeals of Maryland Opinion does not apply the current law of the First, Ninth and Fourteenth Amendments to the U.S. Constitution as enunciated by present case law.

The date of the entry of the judgement sought to be reviewed was December 14, 1992. The date of the Court order denying a Motion for Consideration was January 20, 1993.

The "Statutory Provisions" confering jurisdiction on this Court are those

contained in the First, Ninth and Fourteenth Amendments to the Constitution of the United States.

THE CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or the press; or the right of the people to assemble, and to petition the government for a redress of grievances.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment XIV

Section I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No States shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

The Respondent Rosenberg, a child psychologist, was sued in defamation by Helinski, father of a two year old girl, following an interview given by Rosenberg to a T.V. reporter, during which Rosenberg accused the father of sexually abusing his

child. Rosenberg had just testified in a Court proceeding on August 20, 1985, the issue involved being a contempt charge against the ex-wife for failing to obey a Court order in a previous case, scheduling father's visitation rights.

Rosenberg testified in Court and then defamed Helinski in an interview given afterwards to the T.V. reporter. The station (Channel 13) telecast the interview during the 6:00 P.M. news and later at 11:00 P.M. that same day. Suit was filed in the Circuit Court of Baltimore City on August 5, 1986 by Helinski against the Respondent for defamation and a jury trial was requested.

An Answer was filed. both parties exchanged Interrogatories and Answers and Depositions were taken of the parties and a Forensic Psychologist, Dr. David Shapiro, Petitioner's expert witness.

Respondent, Rosenberg filed a Motion for Summary Judgement on March 11, 1987.

The issue raised in this Motion was "malice." A Federal issue was not specifically alleged. The Circuit Court Judge of Baltimore denied Rosenberg's Motion.

A second Summary Judgement Motion was filed by Rosenberg on June 6, 1990 before a different Circuit Court Judge. For the first time in almost four years U.S. Constitutional questions were raised. "Free speech" was mentioned. Although there were numerous "honest disputes of material facts" inherent in the pleadings, etc., the Motions Judge decided there were "no facts to go to a jury" and granted the Motion. Federal questions which were raised were not answered.

This Petitioner (Helinski) then appealed to the Court of Special Appeals of Maryland on January 1, 1991. In answering the appeal

the Respondent emphasized Constitutional malice. Again Federal questions were raised but not answered. This court, however, remanded the case on a question of Maryland law.

The Respondent then filed a Writ of Certiorari to the Court of Appeals of Maryland on March 16, 1992. Federal questions were raised and were partially answered. This court reversed the intermediate Appellate Court and rendered Judgement for Respondent Rosenberg.

THE ORIGINAL CASE ON MERITS

Very briefly, the original case on the merits, from which this defamation case was spawned, was a case tried in the Circuit Court of Baltimore County, July 26, 1985 on the issue of visitation rights of the father. The wife of Helinski had falsely accused the father of sexually abusing their two year old child. After hearing all the testimony (Rosenberg wasn't a witness here) the presiding

judge found the Petitioner (Helinski) innocent of any molestation or other malfeasance stating he did not believe the ex-wife.

ARGUMENT

The Court of Appeals of Maryland agreed that:

1. Rosenberg defamed the Petitioner;

2. That he was negligent in so doing;

3. That grave damage was caused to the Petitioner. The Court added that the Respondent Rosenberg was not legally liable because he was protected by a Qualified Privilege - Fair Reporting Privilege.

The Court of Appeals has completely ignored the main points in Yerkie v. Post-Newsweek, 4th Cir., 470 F. Supp. 91 (1979), and Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 105 S. Ct. 2939 (1985). The case at bar is a defamation case involving

two private citizens about a matter not of public concern. This the Maryland Opinion agrees with. Dun & Bradstreet says, about a case between a credit company and a contractor, relative to a dispute not of "public concern":

"We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern."

The Yerkie case preceded Dun & Bradstreet and stated:

"A qualified privilege does not exist for the media simply because the alleged defamatory material related to a subject of general or public interest."

If not for the media, certainly not for the individual.

Another major point which, like a "traditional thread" runs through a number of the important Supreme Court cases since N. Y. Times v. Sullivan, 376 U.S. 254 (1964) is the issue of balance between the right of the public to information about "matters of general public importance" and the right of the individual to protect his reputation and good name. This obviously most important issue is completely overlooked or ignored by the Appellate Court.

The Dun & Bradstreet Court quoting the opinion in Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997 (1974), stated further:

"We must employ the approach approved in Gertz and balance the State's interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this

type of expression. This State interest is identical to the one weighed in Gertz. There we found that it was 'strong and legitimate'." A state should not lightly be required to abandon it." (Underlining added.)

The protection of one's reputation, according to Justice Stewart in Rosenblatt v. Baer, 383 U.S. 75 (1966), "reflects no more than our basic concept of the essential dignity and worth of every human being - a concept at the root of any decent system of ordered liberty." This protection of private reputation, added the Justice, "is left primarily to the individual States under the Ninth and Tenth Amendments."

Private persons generally lack effective opportunities for rebutting defamatory statements, not like public persons. Petitioner Helinski was a private person. He would not discuss an ongoing case with the media.

He was defending himself against a vicious, untrue attack from the beginning.

CONCLUSION

The Court of Appeals of Maryland, decided:

1) That Respondent Rosenberg defamed the Petitioner Helinski; 2) That Rosenberg was negligent in so doing; and, 3) That the defamatory accusations "inflicted grave harm." The Appellate Court, also, in reaching its conclusion that the statements were "privileged" and subject to the fair report privilege, abandoned the issue of "public concern." (p. 9, C. of A. Opinion.)

The Appellate Court failed to address the important issue of "balance of rights" between the public and the individual private person. There is certainly a serious imbalance in considering the public right to know of the details of private domestic

squabble to be more important than the right of a private person to protect himself from the unfair, false charge of molesting his own child. It has been said a number of times that a private person has a difficult, almost impossible task of defending his reputation, particularly in television, unless he, too, compromises his ethical standards. The Court of Appeals of Maryland should be reversed.

Respectfully submitted,

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RONALD R. HELINSKI

Plaintiff

v.

LEON A. ROSENBERG

Defendant

IN THE CIRCUIT COURT

FOR BALTIMORE CITY

CASE NO. 86217018/CL53895

* * * * * * * *

OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGEMENT

This is a Motion for Summary Judgment filed by the Defendant and I am required in this context to draw inferences favorably to the Plaintiff; and, in effect, try to determine if there are any facts which can be credited by a jury and which may permit the jury to conclude upon law, and those and other

facts to be deduced or presented at trial, that there is liability on the part of Defendant Rosenberg.

The Circuit Court for Baltimore County had initially concluded that whatever happened to this child was not done by the Plaintiff. This was an opinion expressed in July 1985 at the conclusion of a custody proceeding. At that time, the Court had reopened the proceeding, at the behest, I believe, of the mother of the child, to permit "new" or additional evidence to be submitted to the Court with reference to the issue of custody. That new evidence was the testimony by Dr. Rosenberg, the Defendant here, an expert child psychologist. At that proceeding, on August 20th, 1985, Dr. Rosenberg presented his evaluation and recommendation. The accusation by the mother to which he spoke and which Judge Jacobson, of that Court, was

willing to hear, was the Plaintiff's (alleged) sexual molestation of his two year old child. The recommendations of the doctor were accepted by Judge Jacobson. His evaluation inlcuded his clinical findings, which, necessarily, included what the child had told him, to wit, that her father had hurt her in the genital area. (I believe counsel agreed that is a sufficient paraphrase of what she told him); and that, among other things, is what he repeated to the Court in the course of his testimony.

Unfortunately, perhaps, for all concerned in this case, the mother, the father and particularly the child, these matters are subject to television "entertainment news," so to speak. The matter had already been, to some degree, exposed in a public forum, albeit a privileged one, open to press and

public view and hearing. This case and these accusations extended over a considerable period of time before and since the episode which brings us here. See Helinski v. Helinski, No. 1377, September Term, 1987, per curiam, filed May 9, 1988, and Helinski v. Helinski, No. 1000, September Term 1986, per curiam, filed March 12, 1987. It is clear that the media did have an interest; and therefore interviewed the participants in the reopened proceeding of August 20, 1985. At the conclusion of the hearing, Judge Jacobson, without changing his initial opinion as to whether Mr. Helinski was responsible for the harm to his daughter, accepted Dr. Rosenberg's recommendation that both parents have the benefit of psychiatric examination.

In the course of the television interview, Dr. Rosenberg restated, in response to a

question, what in fact he told the Court, Judge Jacobson, which was, pertinently, what in fact the child told him in clinical evaluation.

These statements were broadcast on the 6 P.M. news. He said the child talked very directly about being hurt by her father and she talked about being hurt by her father in the genital area. That this was Dr. Rosenberg's testimony is corroborated by his court testimony, the transcripts of which have been submitted to this Court. Dr. Rosenberg made a second statement that when the child talked about being hurt, she expressed "real fear, real anziety; and a two and one-half year old child cannot playact that well. It's beyond them." This too is corroborated by testimony from the transcript which is part of this record. And there was a third statement again

referring to the 6 P.M. news broadcast, "Whatever did occur was frightening, but it looked like it was time limited and I think we have a very good chance of overcoming any negative effects." Similarly, this corroborated by the trial transcript. The eleven o'clock news repeats the first statement. The child talked very directly about being hurt by her father and she talked about being hurt by her father in the genital area. That is the only commentary or statement attributed to Dr. Rosenberg on the 11 P.M. news. Those are the statements here in question.

The Defendant could have exercised some restraint of course and said "no comment," or could have found another formula for answering the question of the television reporter. But the First Amendment gives him the privilege of un-

fettered speech, or I should say speech fettered only by the law which I'll address in a moment. He was not providing an opinion to the reporter, since that was not requested; but rather a restatement of opinion testimony. Nor was he presenting an "idea" of his, something in the intellectual firmament for the public to chew on and pass around in the market place of ideas; but merely recounting what he had already said in a public, and privileged, forum. What he recounted was not false. It was true history even though it included, by implication, if you stretch it somewhat and I do so favorably to the Plaintiffs for the purpose of this decision, his opinion or belief that what the child said was acceptable to him clinically as true.

However, no evidence is presented or proffered in this proceeding that would

entitle the jury to be convinced by any evidentiary standard, in accordance with the standards presented to us by Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), and Jacron Sales Co. v. Sindorf, 276 Md. 250 (1976), that Dr. Rosenberg, the Defendant, acted with malice or had reason to know any falsity. The proceeding had been reopened by Judge Jacobson; and the Court's prior conclusion that it had not been convinced, as a judicial matter, of Plaintiff's culpability is not sufficient to make what Defendant recounted, i.e., the comments of his patient to be false.

The same rationale applies to the Restatement of Torts Section 580B. A jury could not conclude that he spoke with reckless disregard for the truth. The truth in this context is what he was told by his patient; and more to the point,

what he recounted to the judge a few moments before in an open courtroom. Dr. Rosenberg was obviously persuaded to a sufficient degree of the clinical credibility of the child and certainly of what he in fact had told the Court in the courtroom as an expert. So he evidenced no recklessness in recounting what in fact had taken place nor in ascertaining that what he said took place did take place, whether it be that the child told him these things or that he recounted what the child told him to the Court.

Finally, nor could a jury be convinced by any evidence in this record that he negligently failed to ascertain the truth either of the fact of his accounting, which is self evident, or of the accuracy of what he recounted to the Court. It is virtually stipulated in the case that what he said he said, he did say. And there is no real

dispute either that what the child told him in the clinical evaluation, in fact the child did tell him in the clinical evaluation. Nor is there any dispute that he took into account as part of his opinion and evaluation to Judge Jacobson what the child told him and, as clinical material was a truthful recounting by her of what took place, namely that there was a touching or placing, a contact between father and daughter in the genital area.

The next issue is could the jury be permitted to conclude, based upon the evidence submitted, that Dr. Rosenberg's evaluation techniques or methodology were negligent so that had he evaluated in a different matter he would have disbelieved or discounted the child and thus not have expressed an expert opinion at all to the Court, therefore not being in a position to recount

that expert opinion for WJZ-TV. Here I conclude that Dr. Shapiro, apparently a well-respected forensic psychologist, lacks the expertise in this context to permit the jury to conclude that Dr. Rosenberg was negligent.

Now this is not to say that a forensic psychologist might, in certain circumstances, not testify in a similar proceeding. He might have testified, for example, in the very proceeding before Judge Jacobson as a possible expert witness on the custody/visitation issue before Judge Jacobson. But for the purpose of opining as to Dr. Rosenberg's negligence, I have reservations about Dr. Shapiro's lack of direct involvement as a specialist, by his own admission, in the area of child sexual abuse.

I say this because I think it accept-

able and conceded by all that this is a highly sensitive and specialized field of medicine; and that those who practice this field practice in the field for the purpose not of litigating issues, but of helping patients. The frame of reference is quite different; and the evaluation presented by Dr. Rosenberg to the Court, based upon the recounting of the child's experience was of such peculiar nature, given the context of the proceeding before Judge Jacobson, that a contrary standard of care opinion would best come from someone who practiced in that particular specialty. This obviously falls in a very gray area, because on the one hand it's clear that Dr. Shapiro has an expertise which is highly important, credible and valuable in a particular litigation context and he may well have been provided useful to enough

pecple, did not go to enough data sources.

And here it should be repeated that Dr. Rosenberg's recommendation was accepted by Judge Jacobson. If a challenge was to be laid to Dr. Rosenberg's professional capacity to testify at all, it would have been at that proceeding. Assuming one had been made, Judge Jacobson was not persuaded, and did accept Dr. Rosenberg as an expert and relied upon him. So what we have in effect is a challenge by the back door to this witness who was accepted by the Court, with the possible result that the jury in this case would be permitted to say, several years later, that Dr. Rosenberg's preparation was negligently performed or accomplished. I don't think there is sufficient evidence to permit the jury to so conclude. In any event, Dr. Shapiro's proffered testimony in this motion proceeding is insufficient as a

basis for concluding that Dr. Rosenberg negligently failed to ascertain the truth, which lies at the heart of this proceeding. So I find from these conclusions that the Plaintiffs have not succeded in reaching and passing the standards set by law.

I find also as an independent conclusion that the matter had been so amplified and been placed so much in the public arena, that this was already a public matter with accusations flying. It had already been in court and was back again. This Defendant came upon the scene in the midst of the matter, even though it had been resolved favorably to Mr. Helinski by Judge Jacobson, in a protected forum. The television coverage of it was such as to reflect some controversy, which is the only "public" characterization which I think is fair to make. I'm not suggesting that this is a

public issue or a public opinion. Indeed it's really quite the opposite; and it's unfortunate that these matters are magnified in the public eye. An accusation that the father has sexually abused a two year old child is not something that should be at risk for our exchange of ideas in our society; but this is not to say that it isn't the reality. I do find it was a publicized matter in a limited sense. I'm not finding that it was broadcast routinely and constantly. In fact, the Court has no factual knowledge or basis for knowing the extent to which it had ever been trumpted in the news.

But it is fair to say that it was a controversial matter and that Dr. Rosenberg did not create the controversy between the parties. The accusations came from the parties and he was simply called in as an

innocent bystander to express an opinion to the Court, to give an evaluation and recommendation to the Court. He was drawn into this matter and I don't believe that he, by his individual action in the case of answering a question of a news reporter, did more than state a factual element of the total controversial universe which was created by the accusations of the mother against the father. I refer here to Cox Broadcasting Corp., 420 U.S. 469 (1975). Although I concede that it's not precisely on point, I see it as "spiritually" on point.

So for those reasons, and it is a close question in my view, I rule as I do because I believe in some instances some cases do draw upon the ccurt to understand and articulate the atmosphere in which the decision is being reached. Here what persuades the court in the final analysis is

that you have a professional called into Court to speak about a matter. He does so truthfully, to his best professional judgment, a judgment which the Court in part accepted. He then is merely asked by a reporter in effect, "What did you say," and he responds with what he said and believed based upon, not accusations of another person, but upon his own evaluation, an evaluation which could not be made false, merely because Judge Jacobson was not convinced in a judicial tribunal, that Mr. Helinski did not do what he was accused of doing.

What this case asks this Court to do is to permit a jury to consider upon the evidence which has already been noted that this Defendant in that circumstance, in that atmosphere, should be penalized in the exercise of his right of free speech

and the Court is not convinced the law so dictates. That is the judgment of the Court. The Defendant's Motion for Summary Judgment is GRANTED. I thank ccunsel very much for their patience and for their useful memorandum and exhibits. The Order of the Court is attached.

_____ _____

Date John Carroll Byrnes

Judge

The foregoing is a Court edited repetition of its oral Opinion on August 8, 1990.

_____

John Carroll Byrnes

Judge

REPORTED

IN THE COURT OF SPECIAL APPEALS OF

MARYLAND

NO. 184

September Term, 1991

RONALD R. HELINSKI

v.

LEON A. ROSENBERG

Alpert,

Wenner,

Motz,

J.J.

Opinion by Alpert, J.

Filed: January 29, 1992

This defamation case stems from an earlier child custody proceeding in the Circuit Court for Baltimore County. At issue was whether Ronald Helinski sexually molested his daughter; Judge Leonard S. Jacobson initially concluded that he did not. One month later on August 20, 1985, the proceedings were reopened to permit the child's mother to introduce additional evidence. This evidence included the testimony of Dr. Leon Rosenberg, the defendant in this case. Rosenberg is an expert child psychologist whose testimony recounted the child's statement that her father hurt her in the genital area. The new evidence did not seem to persuade Judge Jacobson to change his initial conclusion that Helinski did not molest his daughter.

The news media was interested in the

child custody case, and were on hand immediately after the August 20 proceeding. A local television station interviewed Rosenberg as he came out of the courthouse. During the interview, Rosenberg repeated what he had testified in court:

> The child talked very directly about being hurt by her father and she talked about being hurt by her father in the genital area.
>
> ———
>
> When she finally talked about being hurt, she expressed real fear, real anxiety, and 2 1/2 year old child cannot playact that well. It's beyond them.
>
> ———
>
> Whatever did occur was frightening, but it looked like it was time limited and I think we have a very

good chance of overcoming any negative effects.

That station's six o'clock news program broadcast Rosenberg's statements, and the eleven o'clock program repeated the segment containing his comment referring to the child's statement about being hurt in the genital area.

The present litigation ensued, with Helinski alleging that Rosenberg defamed him by uttering these statements. Before trial, Rosenberg filed a Motion for Summary Judgment. Judge John Carroll Byrnes of the Circuit Court for Baltimore City conducted a motions hearing, subsequent to which he filed an Opinion and Order Granting Defendant's (Rosenberg's) Motion for Summary Judgment.

Judge Byrnes' Opinion characterized Rosenberg's press statement as follows:

He was not providing an opinion to the reporter since this was not requested. Nor was he presenting an "idea" of his, something in the intellectual firmament for the public to chew on and pass around in the market place of ideas; but merely recounting what he had already said in a public, and privileged, forum. What he recounted was not false. It was true history even though it included, by implication . . . his belief that what the child said was acceptable to him clinically as true.

Judge Byrnes found nothing in the evidence to suggest that Rosenberg acted

with malice or had reason to know that his statements were false. Furthermore, according to Judge Byrnes, the trial court's conclusion that Helinski had not molested his child was insufficient to make Rosenberg's comments false. Addressing section 580B of the Restatement Second of Torts,[1] concerning defamaiton of private persons, Judge Byrnes concluded that Rosenberg could not be said to have spoken with reckless disregard for the truth. "The truth in this context is what he was told by his patient; and more to the point, what he recounted to the judge a few moments before in an open courtroom." Judge Byrnes also rejected the argument that Rosenberg was negligent in failing to ascertain the truth. "It is virtually stipulated in the case that what he said, he did say."[2]

Helinski also argued that Rosenberg's

techniques and methodology were negligent, thereby causing him to reach an erroneous conclusion which he otherwise would not have reached and to which he would not have testified. Judge Byrnes concluded that Dr. Shapiro, Helinski's expert witness on this matter and a forensic psychologist, lacked the expertise in child sexual abuse necessary to address Rosenberg's possible negligence. He noted that a "contrary standard of care opinion would best come from someone who practiced in that particular specialty." He added that Dr. Shapiro really never said that Rosenberg was negligent in making the defamatory statements, and that any challenge to Rosenberg's professional capacity to testify should have been made during the proceeding before Judge Jacobson.

Helinski now appeals, arguing that

Judge Byrnes erred by granting summary judgment in the face of a genuine dispute of material fact, and by ignoring evidence of Rosenberg's negligence.

As a preliminary matter, we note the standard for review of a trial court's grant of summary judgment:

> Our cases make indelibly clear that at a hearing on a motion for summary judgment the trial judge's role is not to decide the merits of the case but rather to determine whether any material facts are in dispute. Summary judgment should be granted only when the pre-trial documents demonstrate that no such dispute exists and that the moving party is entitled to judgment as a matter of law.

> In reviewing a motion for summary judgment, an appellate court primarily consider whether or not a factual issue exists, and in so doing should resolve all inferences against the party making the motion.

McDermott v. Hughley, 317 Md. 12, 22 (1989); see id. (collecting cases).

(footnotes)

[1] One who publishes a false and defamatory communication concerning a private person . . . is subject to liability, if, but only if, he

> (a) Knows that the statement is false and that it defames the other,
>
> (b) Acts in reckless disregard of these matters, or

(footnotes)

(c) Acts negligently in failing to ascertain them.

Restatement 2d of Torts, Sec. 580B. The Court of Appeals has adopted this section in cases of purely private defamation. Jacron Sales Co. v. Sindorf, 276 Md. 580, 596 (1976).

[2]There is some disagreement, however, as to whether Rosenberg's statements were a response to questions from a reporter. Rosenberg said that they were, and Judge Byrnes thought so, but Helinski argues that nothing in the record demonstrates this, and the news segment transcript is similarly devoid of evidence.

DEFAMATION

Maryland cases have stated clearly the elements of a prima facie case of defamation, and we need not repeat them here at any great

length.

> [T]o establish a case of defamation, the plaintiff must show (1) that the defendant made a defamatory communication, i.e., that he communicated a statement tending to expose the plaintiff to public scorn, hatred, contempt, or ridicule to a third person who reasonably recognized the statement as being defamatory; (2) that the statement was false; (3) that the defendant was at fault in communicating the statement; and (4) that the plaintiff suffers harm.

Kairys v. Douglas Stereo, 83 Md. App. 667, 678 (1980) (citations omitted).

1.

Rosenberg's statements, both in and

out of court, were of the type that might damage Helinski's reputation. Considering the background upon which the words were uttered, it is reasonable to infer that Helinski was being accused of sexual child abuse. It matters not that Rosenberg was repeating both in and out of court the words of the alleged child abuse victim. "The common law of libel has long held that one who republishes a defamatory statement 'adopts' it as his own, and is liable in equal measure to the original defamer." Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1298 (D.C. Cir. 1988) (citations omitted). See also, Dameron v. Washington Magazine, Inc., 779 F.2d 736 (D.C. Cir. 1985), cert. denied, 476 U.S. 1141, in which the court opined that, "[t]he conditional immunity that applies to the publication of fair and accurate

reports of official proceedings is an exception to the common law rule that one who repeats or republishes a defamation uttered by another 'adopts' it as his own." Id. at 739 (magazine article reporting on safety at National Airport fell outside privilege's scope because it did not relate directly to governmental reports or proceedings). Accord White v. Fraternal Order of Police, 909 F.2d 512, 527 (D.C. Cir. 1990) (common law rule is that republisher is deemed to have adopted the underlying defamation as its own); Reuber v. Food Chem. News, Inc., 925 F.2d 703 (4th Cir. 1991).

As a threshhold matter, a trial court may determine whether the words spoken are reasonably susceptible of a defamatory meaning. Having so decided, the jury must decide whether they were actually defamatory. See, Embrey v. Holly, 48 Md. App. 571 (1984),

rev'd in part, aff'd in part, 293 Md. 128 (1982).

If the words convey defamatory meaning, a publication is slander or libel per se and presumed to injure a person's reputation. See, Id. at 579. At common law, statements imputing heinous crimes, inter alia, were slanderous per se. Id. at 579, n. 9. The sexual abuse of a small child meets the criteria for slander per se: it is the kind of allegation that would expose the person about whom it was spoken to widespread scorn, hatred, and contempt. Moreover, sexual child abuse is a crime. See, Md. Ann. Code, art. 27, Sec. 35A (1957 & Supp. 1991).

2.

In order to be actionable, the allegedly defamatory statement must have been false. Helinski bears the burden of proving that Rosenberg's statements were false. Jacron

Sales Co. v. Sindorf, 276 Md. 580, 597 (1976). For the purpose of ruling on the motion for summary judgment, the the trial judge should consider the fact that Judge Jacobson at one point in the custody proceeding clearly indicated that he believed that Helinski did not molest his young daughter. Therefore, by way of inference, the daughter's statement was "false." Dr. Rosenberg repeated the false statement in court, and on the courthouse steps repeated that testimony and added a ccnclusion of his own.

3.

In Jacron Sales Co. v. Sindorf, 276 Md. 580, 596 (1976), the Court of Appeals held that " standard of negligence, as set forth in Restatement (Second) of Torts, Sec. 580B (Tent. Draft No. 21, 1975), which we here adopt, must be applied in cases of purely private defamation." See also,

50 Am. Jur. 2d Libel and Slander, Sec. 184 (1970) ("it is no defense that a defamatory imputation resulted from mistake [or] negligence"). If the custody case was a "purely private matter," then the negligence standard applies. See, Restatement (Second) of Torts, Sec. 580B cmt. a (1977).

The motions judge rejected Dr. Shapiro's testimony, which, if accepted, would have established on a prima facie basis Rosenberg's negligence in repeating the defamatory remarks. Without that evidence, Helinski could not defeat Rosenbery's motion for summary judgment.

Helinski argues vociferously that Judge Byrnes applied the wrong standard of law in excluding Dr. Shapiro's expert testimony on the issue of Rosenberg's negligence. It appears that he is contending that the motions judge does not have the authority

to decide the qualifications of an expert. We note that in order to pass muster at a summary judgment proceeding, the opponent must produce evidence that would be admissible at trial. See, Gooch v. Maryland Mechanical Sys., Inc., 81 Md. App. 376, 396 (1990) ("facts proffered in opposition to the granting of a motion for summary judgment must be admissible in evidence"). Thus, the standard for determining an expert's qualifications would be the same at a motions hearing as that at a trial.

The motions judge opined that Dr. Shapiro, who admittedly had no experience in the area of sexual child abuse, was not qualified to render an opinion on whether Dr. Rosenberg had adequately investigated the alleged child abuse. Dr. Shapiro is a psychologist licensed to practice in Maryland and in the District of Columbia. He has an advanced certificate

in forensic psychology, for which he did five years of supervised post-doctoral work. His subspecialties include competency evaluations in criminal, professional liability and malpractice trials. Whether an expert is qualified to render an opinion is a matter to be determined by the court in its discretion and may only be disturbed on appeal where there is a clear showing of abuse of that discretion. See, Mondawmin Corp. v. Kres., 258 Md. 307, 320 (1970) (judge has wide latitude in determining expert witness's qualifications); Spence v. Wiles, 255 Md. 98 (1966) (trial court's determination not reversible on appeal unless clearly erroneous or clear abuse of discretion).

Although the trial court's decision usually stands undisturbed on appeal, we must examine Dr. Shapiro's testimony to determine whether the trial court erred as

a matter of law, or abused its broad discretion. Here we follow the analysis outlined by the Court of Appeals in Radman v. Harold, 279 Md. 167 (1976), a medical malpractice case in which the trial judge applied an erroneous legal standard in excluding a witness's testimony, Id. at 168 (internal medicine specialist's lack of direct experience in gynecological surgery should not have prevented him, as a matter of law, from testifying as to the standard of care required of a surgeon performing gynecological surgery).

In Radman, the Court of Appeals reviewed the standards controlling the trial court's exercise of discretion in determining whether a witness qualifies as an expert, and noted that "a witness may be competent to express an expert opinion if he is reasonably familiar with the subject under investigation, regardless of whether this special knowledge

is based upon professional training, observation, actual experience, or any combination of these factors." Id., at 169. The court added that it "perceive[d] no reason why a person who has acquired sufficient knowledge in an area should be disqualified as a medical expert merely because he is not a specialist or merely because he has never personally performed a particular procedure." Id., at 171; accord, id. at 172 (collecting cases in other jurisdictions). See also, Ungar v. Handelsman, __ Md. __ (Court of Appeals of Maryland No. 82, Sept. Term, 1990, filed Jan. 7, 1992) Slip Op. at 12.

Our reading of the record leads us to conclude that the ruling excluding Dr. Shapiro's testimony was premised on an error of law. Although Dr. Shapiro is not an expert in child abuse, he is a well respected forensic psychologist.[3]

(footnote)

[3]Black's Law Dictionary defines forensic psychiatry as "[t]hat branch of medicine dealing with diseases and disorders of the mind in relation to legal principle and cases." Black's Law Dictionary, 583 (5th ed. 1979).

Nevertheless, the court in its opinion ruled that Dr. Shapiro:

> lacks the expertise in this context to permit the jury to conclude that Rosenberg was negligent.
>
> ---
>
> Now this is not to say that a forensic psychologist might, in certain circumstances, not testify in a similar proceeding. He might have testified, for example, in the very proceeding before Judge

Jacobson as a possible expert witness on the custody/visitation issue before Judge Jacobson. But for the purpose of opining as to Dr. Rosenberg's negligence, I have reservations about Dr. Shapiro's lack of direct involvement as a specialist, by his own admission, in the area of child sexual abuse.

I say this because I think it acceptable and conceded by all that this is a highly sensitive and specialized field of medicine; and that those who practice this field practice in the field for the purpose not of litigating issues, but of helping patients. The frame of reference is quite

different; and the evaluation presented by Dr. Rosenberg to the Court, based upon the recounting of the child's experience was of such a peculiar nature, given the context of the proceeding before Judge Jacobson, that a contrary standard of care opinion would best come from someone who practices in that particular specialty. This obviously falls in a gray area, because on the one hand it's clear that Dr. Shapiro has an expertise which is highly important, credible and valuable in a particular litigation context and he may well have been provided useful testimony in that

context for Judge Jacobson. But Dr. Shapiro's expertise was lacking in this context, to wit defamation, to convince a jury not that in fact the child may have been fabricating or may have deserved less credence, but rather that Dr. Rosenberg acted negligently in his preparation for his testimony. That is where I draw the distinction.

It is obvious that Judge Byrnes considered Dr. Shapiro's deposition in arriving at his ruling on the motion for summary judgment. Most of the questions propounded by appellee's trial counsel were based on a report that Dr. Shapiro sent to Richard H. James, Esquire, one of Helinski's trial attorneys. The

report, deposition, and permissible inferences to be drawn therefrom, when viewed in a light most favorable to Helinski, see, Syme v. Marks Rentals, Inc., 70 Md. App. 235 (1987), present evidence of Dr. Rosenberg's negligence. For example, in his report to Richard H. James, Esq., dated January 19, 1988, Dr. Shapiro stated:

> As I indicated to you on the phone, since I do not do evaluations of child sexual abuse myself, I certainly do not regard myself as an expert in this field. What I will be commenting on, rather, is the field of forensic evaluation in general, and the necessary methodology that is attached to any assessment or evaluation performed when there is ongoing litigation.

There is, in general, a "standard of the profession" which indicates that in forensic evaluation, one must always supplement clinical evaluation with extensive history taking, corroboration of material from secondary sources, review of records, police reports, legal documents, etc. My general critique is not that Dr. Rosenberg did an adequate clinical evaluation of a child, but rather the conclusions that he reached went far beyond the data available, and failed to take adequate account of the fact that there were many issues of litigation involved that should have

alerted him to the necessity for a more comprehensive assessment.

In his deposition testimony, he added:

Q. Now, in this case, what is your opinion of the evaluation that Dr. Rosenberg did?

A. Well, again, I have to comment on this in a general way. From the point of view of a forensic assessment procedure, I find it very inadequate. I can't really comment on his clinical skills. I am sure that they're very good. And I'm sure he is very excellent in dealing with children. And so, you know, from the point of view - I'm going to assume, and this is

based on my knowledge of Dr. Rosenberg in the past, that his clinical skills are excellent.

My only point was that in a situation like this, a clinical evaluation is not enough. You have to go beyond it. You have to get all these other sources of data.

Our review of the record and of the learned judge's reasons for excluding Dr. Shapiro's testimony convinces us that his ruling was incorrectly premised on his erroneous belief that Dr. Shapiro could not testify, as a matter of law, because he is a forensic psychologist and not a specialist in child abuse. Accordingly, we reverse and remand this case for new

consideration of the motion for summary judgment. On rehearing, the court should make a new preliminary determination as to Dr. Shapiro's qualifications as an expert.[4]

(footnote)

[4] If the trial court determines that Helinski was a public figure, then the "malice" standard applies. See, Capital Gazette Newspapers v. Stack, 293 Md. 528 (1982) (malice involves knowledge that statement was false, or with reckless disregard of whether it was false); see also, Hanlon v. Davis, 76 Md. App. 339 (1988) (no distinction in Maryland between media and non-media defendants with regard to application of constitutional malice standard);

Rosenblatt v. Baer, 383 U.S. 75, 88 (1966) ("It is for the trial judge in the first instance to determine whether the proofs show respondent to be a 'public official.'"); Brewer v. Memphis Publishing Co., 626 F.2d 1238, 1247 (5th Cir. 1980) ("It was for the trial judge, not the jury, to determine whether the evidence showed that either plaintiff was a public figure.")

4.

Helinski also must establish that Rosenberg's statements damaged him. Harm to reputation is presumed in cases of defamation per se, and as we have noted elsewhere, "the plaintiff in such a defamation action could recover 'presumed'

or 'general' damages." Hanlon v. Davis, 76 Md. App. 339, 351 (1988).

PRIVILEGE

Assuming, arguendo, that Helinski establishes all other elements in his defamation claim, the availability of Rosenberg's affirmative defense of "privilege" under the circumstances herein, must be determined. There is no question that the privilege applying in judicial proceedings protects Rosenberg's in-court statements from an action in defamation. See, Korb v. Kowalevicz, 285 Md. 699, 702, 704 (1979) (reaffirming the Maryland rule making unconditional the privilege protecting witnesses in judicial proceedings.) The Court of Appeals in Adams v. Peck articulated the policy reasons for the rule:

> The underlying rationale for according an absolute privilege to defamatory statements made in

> ccurt by participants in judicial proceedings . . . is that such a privilege is necessary to the proper administration of justice. The ultimate purpose of the judicial process is to determine the truth. The investigation, evaluation, presentation and determination of facts are inherent and essential parts of this process. If this process is to function effectively, those who participate must be able to do so without being hampered by the fear of private suits for defamation.

Adams, 288 Md. 1, 5 (1980).

Rosenberg argues that his comments repeating his in-court testimony similarly are protected by the "fair reporting privilege"

described in the Restatement of Torts.

> The publication of defamatory matter concerning another in a report of an official action or proceeding . . . is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

Restatement (Second) of Torts, Sec. 611 (1976) (Report of Official Proceeding or Public Meeting).

The Restatement's comments illuminate the privilege's purpose.

> The basis of this privilege is the interest of the public in having information made available to it as to what occurs in official proceedings and public meetings.

> The privilege is therefore one of general publication and is not limited to publication to any person or group of persons. For the same reason the privilege exists even though the publisher himself does not believe the defamatory words he reports to be true and even when he knows them to be false. Abuse of the privilege takes place, therefore, when the publisher does not give a fair and accurate report of the proceeding.

Id. cmt. a.

Although at first glance the rule appears to cover the instant case, and the appellee so urges, the comment addressing who may exercise the privilege may raise some doubt as to whether it applies here.

The privilege stated in this Section is commonly exercised by newspapers, broadcasting stations and others who are in the business of reporting news to the public. It is not, however, limited to these publishers. It extends to any person who makes an oral, written or printed report to pass on the information that is available to the general public.

* * *

A person cannot confer this privilege upon himself by making the original defamatory publication himself and then reporting to other people what he had stated. This is true whether the original publication was privileged or not.

> Nor may he confer the privilege upon a third person, even a member of the communications media, by making the original statement under a collusive arrangement with that person for the purpose of conferring the privilege upon him.

Id. cmt. a. (illustration omitted) (emphasis supplied).

A strict reading of this portion of the comment could lead one to conclude that the fair reporting privilege may not apply to the person who made the original utterance or who adopts it. See, Liberty Lobby, Inc., 838 F.2d at 1298. Unfortunately, we find no case authority similar to the case at bar in which the person claiming the privilege was also the person who made the initial in-court

statements.[5] We note, however, the case Stover v. Journal Publishing Co., 731 P.2d 1335 (N.M. App. 1985), cert. denied, 484 U.S. 897 (1987) in which the court discussed but did not apply comment c. "The parties sharply disagree as to whether comment c, which purports to create a self-reported statement exception to the fair privilege, was ever presented to or voted on by the American Law Institute (A.L.I.), publishers of the Restatement." Id.at 1339. The court noted, and we are inclined to agree, that the exception was intended to prevent the privilege's abuse.

(footnote)

[5]Indeed, the case that Rosenberg cites to support his argument that the privilege protects him is not a case in which the

(footnote)

utterer of the in-court statement was also the utterer of the out of court statement. See, McBee v. Fulton, 47 Md. 403 (1878) (defendant was newspaper).

For example, a person might bring a suit or hold a public meeting not with the intention of pursuing the purported objective but to cause harm to another, by pleading or announcing defamatory matter and then using the protective shield of the fair report privilege to republish the defamatory matter to the world or to a targeted audience. Stover, 731 P.2d at 1339.

The Supreme Court of Arizona in Greenacres Trust v. London, 688 P.2d 617, 626 (1984), observed that: "One exception to this wide application is the speaker who by design uses the privilege to republish defamation he previously made during the public proceeding."

There is nothing in the record, at this juncture, to indicate that Dr. Rosenberg's out-of-court statement was "not with the intent of pursuing the purported objective (reporting his courtroom testimony to the television reporter) but to cause harm to another." Thus, the so-called self-reported statement exception to the privilege does not appear to be applicable in light of the current record in the case sub judice.

In order to determine whether the privilege obtains, we look back to its laudable purpose:

Prior to the recognition of any constitutional privilege to defame, it was clearly recognized to be in the public interest that information be made available as to what takes place in certain kinds of judicial, legislative, and other public proceedings. Therefore, a qualified privilege of a special kind was recognized under which newspaper or anyone else might make such a report to the public. The privilege rests upon the idea that any member of the public, if he were present, might see and hear for himself, so that the reporter is merely a substitute for the public eye - this, together with the obvious public interest in having public

affairs made known to all.

W. L. Prosser and W. P. Keeton, The Law of Torts at 836 (5th ed. 9184) (emphasis added).

The reason behind the privilege was further explicated in Ricci v. Venture Magazine, Inc., 574 F.Supp. 1563, 1567 (U.S.D.C. Mass. 1983):

> Media reports serve the public purpose of informing readers who wish to know what occurs in courts, but cannot make personal sacrifices required to attend in person. Daily reports of events occurring during long trials are permissible, and even the report of a single day's proceedings commonly focuses on one or more events of special interest. Judicial proceedings

> often consist of long periods of unexciting evidence and colloquy, punctuated by occasional exchanges among participants in which depths of human emotion are exposed. Media reports may permissibly focus on the more dramatic occurrences, to the exclusion of the less interesting.

Undoubtedly, the privilege, if not abused, would be available to any courtroom observer who reports to the media what he saw and heard in the courtroom. Subject to the exception hereinbefore noted, there is no logical reason why the privilege should not be available to a testifying witness who repeats what he said while so testifying. To hold otherwise would produce the anomalous result where

two witnesses to the same incident could be afforded quite different positions upon reporting trial testimony: if one does not testify but reports the testimony of the other, he enjoys the privilege, but if the testifying witness repeats what he said in court, he does not enjoy the privilege. The result is more than anomalous - it is absurd.

Accordingly, we hold that a qualified privilege is available to anyone who repeats, in the context of reporting, utterances made in a protected forum, provided, of course, that one, the report otherwise meets the requirements enumerated in the Restatement's formula of the general rule, i.e., the report is accurate and complete or a fair abridgement of the occurrence reported and, two, the self-reported statement exception

is not applicable and the privilege is not otherwise abused.

JUDGMENT REVERSED: CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

APPELLEE TO PAY THE COSTS.

IN THE COURT OF APPEALS OF MARYLAND

NO. 25

September Term, 1992

LEON A. ROSENBERG

v.

RONALD R. HELINSKI

Murphy, C.J.

Eldridge

Rodowsky

McAuliffe

Chasanow

Karwacki

Bell,

J.J.

OPINION BY MURPHY, C.J.

Filed: December 14, 1992

We granted certiorari in this defamation action to consider whether a psychologist, whose expert in-court testimony in a child custody matter supported the wife's accusation that her husband had sexually abused their child, is privileged to reiterate the substance of his testimony to journalists waiting for him outside on the courthouse steps.

I

This case implicates the volatile mix of a father's personal reputation, the specter of child sexual abuse, the ubiquitous eye of television, the limits of free speech, and the privileged status accorded to reports of events in court. The dispute in question arose seven years ago in the midst of rancorous divorce and child-custody proceedings involving the Respondent, Ronald Helinski; his wife, Jacqueline Garner Helinski;

and their infant daughter, Jackie.

A. The underlying domestic litigation

The Helinskis sought to end their marriage of some five years. At a hearing held on July 26, 1985, before the Circuit Court for Baltimore County (Jacobson, J.), Mrs. Helinski opposed her husband's request for unsupervised visitation with the child, who was then two years old. She alleged that Mr. Helinski had previously sexually abused their daughter. The mother offered as part of her evidence the opinion of expert witness Dr. Charles Shubin, a pediatrician at Baltimore's Mercy Hospital, who testified that his examination of Jackie had revealed a well-healed scar within the child's genitalia. Shubin asserted that the scar was characteristic of, and diagnostic of, a sexual injury.

The trial court granted the parties a divorce, and permitted Mr. Helinski rights of unsupervised visitation with his daughter. It said:

> "I do not believe Mr. Helinski has demonstrated in any way he is the kind of man that is going to do these terrible things to his own child. I don't know what is behind all of this, but I do not believe that he is guilty of ... any child abuse of his own child; and I will not deprive him of the opportunity to visit with that child."

The trial court stated that while it could not explain the origin of the scarring described by Dr. Shubin, it found no connection between the injury and Mr. Helinski's conduct.

Mrs. Helinski immediately filed a motion to amend the visitation provisions of the

divorce decree. She also denied her ex-husband access to the child, which prompted him to petition the trial court to hold the mother in contempt for violating the visitation order. Thereafter, on August 20, 1985, the Helinskis appeared once more before the Circuit Court for Baltimore County where Mrs. Helinski repeated her suspicions of child abuse as justification for defying the court order. She proffered the testimony of Petitioner Leon Rosenberg, Ph.D., child psychologist and associate professor of medical psychology and pediatrics at Baltimore's Johns Hopkins University School of Medicine, whom Mrs. Helinski had consulted in the interim between the two hearings. The trial court then, in effect, reopened the hearing of July 26 in order to reconsider the question of visitation, and thereby addressed for a second time the allegations

of sexual abuse along with the new issue of contempt.

Rosenberg testified that the diagnosing physician, Dr. Shubin, had referred Mrs. Helinski and Jackie to him. He stated that he had evaluated Jackie three times in all, first alone with Jackie, and twice more in the company of the mother. During the first interview, Rosenberg said, he engaged the child in conversation, observed her gestures towards her private parts, and the two together made drawings on paper to allow the child an additional way to refer to the parts of her body. He testified that by these methods he elicited from Jackie that she feared her father because he had hurt her in the genital area, and that she was afraid to see her father out of anxiety that he might hurt her there again. Rosenberg opined that the youngster's presentation had been honest and spontaneous,

without coaching by the mother or another adult. Calling the contents of the interview "extremely clear," the psychologist concluded that the child had undergone a painful and frightening experience involving sexual abuse by her father.

Rosenberg said that his evaluation included a family history taken from Mrs. Helinski, the mother's accounts of Jackie's behavior arousing suspicion of abuse, the medical report of Dr. Shubin, a telephone conversation with Shubin regarding that report, and a telephone conversation with a Child Protective Services social worker, Martin Piepoli, who had earlier interviewed the child using anatomically correct dolls, with reference to which Jackie had indicated that her father had hurt her in the genital region. Rosenberg acknowledged that he never spoke with Mr. Helinski before reach-

ing his conclusions. He conceded, too, that he had known from the outset that the trial court at the July 26 hearing had found no evidence of abuse by the father.

Testifying that unsupervised visits posed a danger to the child, Rosenberg recommended that they be suspended until Mr. Helinski received psychological examination and counseling, which might lead to supervised visits. Stating that it was not convinced that the father had caused the child's sexual injury, but that some danger existed, the trial court ordered psychiatric evaluations of both Mr. and Mrs. Helinski, with a ruling on visitation to await the results; the court further granted Mr. Helinski's request that Jackie be examined by a child psychologist of his own choosing. The rest of the August 20 hearing dealt with procedural matters and with Mrs. Helinski's alleged contempt of court.[1]

(footnote)

[1]The domestic litigation between Mr. and Mrs. Helinski continued almost three more years, with issues not relevant here twice reaching the Court of Special Appeals for resolution in unreported opinions.

B. The instant litigation

Newspaper reporters attended the August 20 hearing, as did a television artist who made sketches of the parties, the presiding judge, and Dr. Rosenberg in anticipation of their later use for media purposes. When the hearing ended, Rosenberg left the courthouse. He was met at the courthouse steps by a television camera crew and a T.V. newswoman, Ann Kellan, representing the Baltimore A.B.C. affiliate station WJZ, who undertook to ask him questions about the case.[2]

(footnote)

[2]Rosenberg stated in his deposition that he and Judge Jacobson left the courthouse together. He recounted that Judge Jacobson responded to the journalist's questions by saying, "No, I can't speak but the doctor can" before the two men parted company.

The record does not preserve their conversation in its entirety. It does, however, contain three short passages, or T.V. film "sound-bites," that were extracted from that conversation and made part of WJZ's news stories about the hearing. The more comprehensive story ran during that evening's six o'clock newscast. Some 2 minutes and 15 seconds in length, the story identified the Helinskis by name, incorporated the artist's sketches, recapitulated the mother's allegations and

Dr. Rosenberg's confirmation of them, and summarized the court's rulings.[3] Interspersed throughout the story were the three passages showing Rosenberg as he spoke to the television camera, which we now set forth verbatim:

> "The child talked very directly about being hurt by her father and she talked about being hurt by her father in the genital area."
> "And when she finally talked about being hurt, she expressed real fear, real anxiety, and two-and-a-half year old child[ren] cannot playact that well. It's beyond them.
> "Whatever did occur was frightening, but it looked like it was time-limited and I think we have a very good chance of, ah, overcoming

any negative effects."

These remarks to the camera on the courthouse steps essentially corresponded to the substance of Rosenberg's testimony during the hearing. A shorter version of the story, running 40 seconds in length and featuring only the first of Rosenberg's statements, ran during that evening's 11 o'clock newscast on WJZ.

(footnote)

[3]Petitioner Rosenberg's brief in this Court contains a purported written transcription of the news story as broadcast by WJZ. A video copy of the news story is included in the record as an exhibit, which we have viewed, and compared to Rosenberg's version as outlined in his brief. Rosenberg's transcription fails to indicate that the news report clearly identified both Mrs. and Mr. Helinski by name.

(footnote)

> By suggesting that the parties remained anonymous in the newscast, the transcript portrays a far more benign injury to the father's reputation than actually materialized. In reality, the newscast depicted Mr. Helinski's appearance via the artist's sketch and broadcast his full name in connection with child sex abuse charges.

Mr. Helinski sued Dr. Rosenberg in the Circuit Court for Baltimore City on August 15, 1986, for defamation. He pleaded that Rosenberg's statements were false, defamatory on their face in imputing to the father the crime of child sexual abuse, and made either negligently or maliciously. Rosenberg answered with a general denial of liability, and inter-

posed the affirmative defense that the statements enjoyed either an absolute or a qualified privilege that would defeat the complaint. Prior to trial, Rosenberg filed a motion for summary judgment pursuant to Maryland Rule 2-501.

The court (Byrnes, John Carroll, J.), after a hearing, granted Rosenberg's summary judgment motion on December 13, 1990. Judge Byrnes first determined that Rosenberg's comments were protected by the privilege given to those who recount in-court testimony. He said:

> "[Rosenberg] was not providing an opinion to the reporter, since that was not requested; but rather a re-statement of opinion testimony. Nor was he presenting an 'idea' of his, something in the intel-lectual firmament for the public

to chew on and pass around in the marketplace of ideas; but merely recounting what he had already said in a public, and privileged forum. What he recounted was not false. It was true history even though it included, by implication ... his opinion or belief that what the child said was acceptable to him clinically as true.

* * *

" ... Here what persuades the Court in the final analysis is that you have a professional called into Court to speak about a matter. He does so truthfully, to his best professional judgment, a judgment which the Court in part accepted. He then is merely asked by a reporter in effect,

'What did you say,' and he responds with what he said and believed based upon, not accusations of another person, but upon his own evaluation, an evaluation which could not be made false, merely because Judge Jacobson was not convinced in a judicial tribunal, that Mr. Helinski did not do what he was accused of doing."

Judge Byrnes next concluded that there was no evidence that Rosenberg acted with malice, or had reason to know that his statements were false, or spoke with reckless disregard for the truth concerning the child's statements to him and his own testimony. Finally the trial court found no evidence of negligence on Rosenberg's part. Judge Byrnes observed that the psychologist's remarks at the T.V. interview matched his testimony at

the hearing. He said: "It is virtually stipulated in the case that what he [Rosenberg] said he said, he did say." Judge Byrnes held, too, that as a matter of law Rosenberg could not be found negligent in evaluating Jackie and reaching his diagnosis of abuse by the father. In this regard, the trial court refused to admit the proffered evidence of Mr. Helinski's expert witness, forensic psychologist Dr. David Shapiro, who challenged the thoroughness of Rosenberg's evaluation. The court found that Shapiro, by his own admission, had no expertise in the field of child sexual abuse examinations.

The Court of Special Appeals reversed the summary judgment and remanded the case to the Circuit Court for further proceedings. Helinski v. Rosenberg, 90 Md. App. 158, 600 A.2d 882 (1992). It first held that Judge Byrnes erred in ruling, as a matter

of law, that the forensic psychologist, Dr. Shapiro, was unqualified to testify as to the invalidity of Dr. Rosenberg's technique in evaluating Jackie. Id. at 170. It turned next to the question of privileged statements. Referring to the Restatement (Second) of Torts, Sec. 611 (1977), which treats reports of official proceedings or public meetings, the intermediate appellate court observed that while a privilege to defame exists for accurate reports of in-court testimony, it is not settled whether the privilege extends to "self-reported" remarks; that is, it is uncertain to what extent, if any, one can make defamatory statements in a privileged forum and then repeat them to others beyond that forum. Id. at 172-73. The court further held that a self-report privilege would apply unless the person repeating his own defamatory

statements acts with the intention of causing harm to another. Id. at 174-75. The Court of Special Appeals thus implicitly directed the Circuit Court, upon remand, to examine more closely the question of whether Dr. Rosenberg acted with such a harmful intention when he spoke to the television news reporter.

We granted Rosenberg's certiorari petition. He asks that we reverse the judgment of the intermediate appellate court and reinstate the judgment of the Circuit Court for Baltimore City. He argues, inter alia, that the Court of Special Appeals permitted the question of negligence, by way of the disputed expert testimony, to intrude into a sphere of common and constitutional law that requires the presence of malice before it will recognize an actionable wrong, and that no malice is present here. He offers

three independent theories triggering a malice standard: 1) that his statements were subject to the so-called fair report privilege; 2) that his statements addressed a matter of public concern, child abuse; or 3) that his statements discussed a person, Mr. Helinski, so steeped in controversy as to be a public figure. There is no need to reach the second and third of these points. Believing that Dr. Rosenberg's comments on the courthouse steps were legally privileged, we shall reverse.

II

A trial court may grant summary judgment when pre-trial documents show that there is not genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Maryland Rule 2-501(e). In reviewing a disposition by summary judgment, an appellate court will

consider primarily whether a factual dispute exists, and in so doing resolve all inferences against the party making the motion. McDermott v. Hughley, 317 Md. 12, 22, 561 A.2d 1038 (1989); Beard v. American Agency, 314 Md. 235, 246, 550 A.2d 677 (1988). The standard for appellate review of a trial court's grant of summary judgment is whether the trial court was legally correct, since a trial court decides issues of law, not fact, when granting summary judgment. Heat & Power v. Air Products, 320 Md. 584, 591-92, 578 A.2d 1201 (1974).

To recover for defamation, a plaintiff must ordinarily establish that the defendant made a defamatory statement to a third person; that the statement was false; that the defendant was legally at fault in making the statement; and that the plaintiff thereby suffered harm. Hearst Corporation v. Hughes, 297 Md. 112,

120-125,466 A.2d 486 (1983); see, Jacron Sales Co. v. Sindorf, 276 Md. 280, 350 A.2d 688 (1976).

It is unnecessary to draw nice distinctions in deciding whether Rosenberg's oral comments made to a television news camera and recorded on film for broadcast constituted libel or slander; the tort at hand is the tort of defamation. See, Hearst, supra, 297 Md. at 118; Laurence H. Eldredge, The Law of Defamation, Sec. 13 (1978) (adopting the term "defamacast"). A defamatory statement is one which tends to expose a person to public scorn, hatred, contempt or ridicule, thereby discouraging others in the community from having a good opinion of, or associating with, that person. Batson v. Shiflett, 325 Md. 684, 722-23, 602 A.2d 1191 (1992). Rosenberg's three statements to the television reporter, taken in the aggregate,

were defamatory in nature. Even though his comments to some extent reconveyed the daughter's own remarks the psychologist, in effect, labeled Mr. Helinski a child sex abuser; he repeated the child's allegations and then declared that the child's fear and anxiety of further abuse were genuine. Rosenberg thus branded Helinski as a man who committed an act reviled by society, which also constitutes a felony. See, Maryland Code (1957, 1992 Repl. Vol.) Art. 27, Sec. 35A.

For the purpose of our analysis, we accept the well-pleaded allegations of Helinski's complaint as true, as well as Judge Jacobson's original finding that no evidence at the first hearing linked Jackie's genital scarring to any conduct by her father. Moreover, we shall assume, without deciding, that Rosenberg acted negligently in evaluating Jackie and in communicating the results

of his examination. We accept Helinski's posiiton that accusations of child abuse, by their very nature, inflict grave harm to one's reputation. Nevertheless, the statements in question here are not actionable. Given the circumstances in which he spoke, Rosenberg enjoyed a legal privilege to defame.

III.

A. Absolute privilege

It is well settled in Maryland that statements made by a witness during the course of judicial proceedings are absolutely privileged, and therefore cannot serve as the basis for an action in defamation. Odyniec v. Schneider, 322 Md. 520, 526, 588 A.2d 786 (1991); Miner v. Novotny, 304 Md. 164, 170, 498 A.2d 269 (1985); Adams v. Peck, 288 Md. 1,3,415 A.2d 292 (1980); Korb v. Kowaleviocz, 285 Md. 699, 704, 402 A.2d 897 (1979). This absolute privilege protects

the witness from liability even if his motive was malicious, he knew the statement was false, or his conduct was otherwise unreasonable. Odyniec, supra, 322 Md. at 527; Adams, supra, 288 Md. at 3; Maulsby v. Reifsnider, 69 Md. 143, 164, 14 A. 508 (1888). The privilege remains absolute whether the defamatory statements be relevant or irrelevant to the subject matter of the proceedings. Odyniec, supra, 322 Md. at 527; Korb, supra, 285 Md. at 704.

The rationale for such an absolute privilege has long been recognized. More than a century ago, we acknowledged "the great importance to the administration of justice that witnesses should testify with minds absolutely free from the aprehension of being annoyed by civil actions for any thing they may say as witnesses." Hunckel v. Voneiff, 69 Md. 179, 198,

14 A. 500 (1888). Public policy, i.e. the public interest in free disclosure of evidence leading to a determination of truth, requires that those who participate in the judicial process must be able to do so without being hampered by the fear of private suits for defamation. Adams, supra, 288 Md. at 5. See, 2 Fowler v. Harper, et al., The Law of Torts, Sec. 5.22 (2d ed. 1986). Because of the need for witnesses to speak freely in court, without intimidation by the possibility of civil liability, an individual's right to redress for defamation is necessarily curtailed. Odyniec, supra, 322 Md. at 528; McDermott, supra, 317 Md. at 23-24; W. Page Keeton, et al., Prosser and Keeton on the Law of Torts, Sec. 114 (5th ed. 1984).

In the light of the foregoing authorities, all of Rosenberg's testimony at the hearing of August 20, 1985, in which he

articulated his investigatory methods and his conclusion that Mr. Helinski had sexually abused Jackie, was privileged. His statements in court are immune from suit.

B. Qualified or special privileges to report judicial proceedings

Operating in tandem with the absolute privilege accorded participants in court proceedings is a lesser privilege, alternatively described as qualified, conditional, or special, given to persons who report to others defamatory statements uttered during the course of judicial proceedings. Again, the applicable Maryland law has long been settled. Reports of in-court proceedings containing defamatory material are privileged if they are fair and substantially correct or substantially accurate accounts of what took place. McBee v. Fulton, 47 Md. 403, 417, 426 (1878); Evening News Co. v. Bowie, 154

Md. 604, 610-11, 141 A. 416 (1928); Brush-Moore Newsp. v. Pollitt, 220 Md. 132, 138, 151 A.2d 530 (1959); Piracci v. Hearst Corporation, 263 F. Supp. 511, 513 (D. Md. 1966), aff'd, 371 F.2d 1016 (4th Cir. 1967); Yerkie v. Post-Newsweek Stations, Michigan, 470 F. Supp. 91, 93 (D. Md. 1979); Batson, supra, 325 Md. at 727.

Generally speaking, qualified or conditional privileges in defamation cases are forfeited only upon a showing of actual malice; that is, a defendant who makes statements with knowledge of their falsity or with reckless disregard for the truth is not protected. Batson, supra, 325 Md. at 733; Marchesi v. Franchino, 283 Md. 131, 139, 387 A.2d 1129 (1978). Since enunciating in Marchesi the actual malice standard as it applies to the conditional privileges invoked in other settings, typically employment deci-

sions and credit references, this Court has not been presented with a case involving privileged reports of judicial proceedings. Our early cases suggest that such a qualified privilege operates only when the report is fair, accurate, and made without malice. See, e.g., McBee, supra, 47 Md. at 426; Bowie, supra, 154 Md. at 610. See also, Restatement of Torts, Sec. 611(b) (1938) (protection lost if report is published solely for the purpose of harming the person defamed). The modern view regards the reporting of judicial proceedings as protected by a so-called special privilege that is, while not absolute, somewhat broader in its scope than other conditional privileges. See, Restatemert (Second) of Torts, Sec. 611, comment a, (1977). The modern view discards the search for malice, and requires simply that the report be fair and substantially correct,

Brush-Moore Newsp., supra, 220 Md. at 138; Yerkie, supra, 470 F. Supp. at 93, or, in the language of the Restatement, "accurate and complete or a fair abridgement of the occurrence reported." Restatement (Second) of Torts, Sec. 611. Under the modern view, the privilege exists even if the reporter of defamatory statements made in court believes or knows them to be false; the privilege is abused only if the report fails the test of fairness and accuracy. Id.

We need not express a preference for either the traditional or modern view in the case before us. The record is barren of any evidence suggesting that Dr. Rosenberg acted maliciously in evaluating Jackie and subsequently reporting his conclusions to the court and the television news team. His professional training and experience of 20 years indicated to him

that Jackie had suffered abuse. Nothing suggests that the psychologist knew his own conclusions to be false, or reached them with a reckless disregard for the truth. To the contrary, he testified that he had been alert to the possibility that the child had been coached, and that he had considered corroborating factors, such as the physician's report and the social worker's report, which were consistent with a diagnosis of abuse. Helinski did not challenge Rosenberg's credibility on these points.

We do not accept Helinski's conclusion that the July 26 hearing, at which Judge Jacobson found no connection between Helinski and the child's genital injury, established the truth, thereby rendering Rosenberg's professional opinion false, and his conduct malicious, for the purposes of a defamation action. Judge Jacobson

expressly revisited the question of sexual abuse at the August 20 hearing. By implication, the truth of this matter before the trial court remained an open question demanding a further inquiry, in which Rosenberg was permitted to offer new evidence. We find no trace of malice here.

The special protection given to fair and accurate reports of judicial proceedings rests on a fundamental premise: "'A trial is a public event. What transpires in the court room is public property .... Those who see and hear what transpired can report it with impunity.'" Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975) (quoting [illegible] v. Harney, 331 U.S. 367, 374, 67 S.Ct. 1249, 91 L. Ed. 1546 (1947)). Any one of three theories may serve as a rationale for granting a privilege to

such reports of events in court: 1) the agency rationale, by which the reporter acts as agent for an otherwise preoccupied public which could, if it possessed the time, energy or inclination, attend the proceeding; 2) the public supervision rationale, by which the reporter provides to the larger community data it needs to monitor government institutions; 3) or the public informaiton rationale, by which the reporter provides information affecting the greater public welfare. Reuber v. Food Chemical News, Inc., 925 F.2d 703, 713 (4th Cir. 1991) en banc, cert. denied, 111 S. Ct. 2814 (1991); Medico v. Time, Inc., 643 F.2d 134, 140-42 (3rd Cir. 1981), cert. denied, 454 U.S. 836 (1981). See, David A. Elder, The Fair Report Privileges, 3-4 (1988). While each of these theories might arguably serve in this case, the agency rationale is clearly applicable.

Rosenberg acted as a conduit between the courtroom and the world at large. He recounted events at a judicial hearing, entirely open to the public, that any members of the community might have seen and heard for themselves.

While the fair report privilege usually arises in lawsuits involving the press or electronic media, it is not limited to defendants in the news business. The privilege extends to protect reports of judicial proceedings made by other persons as well. McBee, supra, 47 Md. at 417; Seymour v. A.S. Abell Co., 557 F. Supp. 951, 955 (D. Md. 1983); See, Restatement (Second) of Torts, Sec. 611, comment c (privilege extends to any person who makes an oral, written or printed report to pass on the information that is abailable to the general public); Eldredge, Law of Defamation

at 421; Elder, Fair Report Privileges at 169. As the public's interest in obtaining reports of court matters remains the same irrespective of the reporter's identity, Rosenberg may invoke the privilege. That he may do so is consistent with the principle that the law generally treats journalists and non-journalists alike in the context of defamation actions. See, Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 773, 105 S. Ct. 2939, 86 L. Ed.2d 593 (1985) (White, J., concurring) (First Amendment gives no more protection to the press than it does to others exercising their freedom of speech); Id. at 784 (Brennan, J., dissenting) (the rights of institutional media are no greater and no less than those enjoyed by other individuals or organizations); Negley v. Farrow, 60 Md. 158, 177 (1883) (proprietor of newspaper entitled to no

privilege not possessed by the community in general).

The instant case thus turns primarily on the fairness and accuracy of Rosenberg's comments to the camera. Of his statements' accuracy there can be no doubt. Rosenberg insists, Helinski concedes, and we agree that the psychologist's three remarks on the courthouse steps essentially repeated what he had said earlier as a witness during the hearing itself. He told the television newspeople that Jackie had discussed being hurt in the genital area by her father; that her fear and anxiety resulting from the hurtful episode were genuine; that young children cannot convincingly simulate such fear and anxiety; that the frightening episode was limited in time; and that the child had a good chance of overcoming her psychological distress. The transcript of

the August 20 hearing makes clear that Rosenberg, using a similar vocabulary and often adopting a similar tone, had offered the very same observations on the witness stand. If anything, parts of his witness' testimony were phrased somewhat more emphatically in connecting Helinski to sexual abuse of the child.

We must next consider the fairness of Rosenberg's report of the events that took place during the hearing in court. Here the Restatement offers a useful guide:

> "Even a report that is accurate so far as it goes may be so edited and deleted as to misrepresent the proceeding and thus be misleading. Thus, although it is unnecessary that the report be exhaustive and complete, it is necessary that nothing be omitted

> or misplaced in such a manner as to convey an erroneous impression to those who hear or read it."

Restatement (Second) of Torts, Sec. 611, comment f. Helinski asserts that Rosenberg's report fails the test of fairness. He contends that Rosenberg additionally should have reported that the trial court found Mrs. Helinski in contempt, ordered further psychological evaluations of the domestic parties, and considered Helinski "innocent" of abusing Jackie. We disagree.[4]

(footnote)

[4] It should be noted that the record does not suggest whether Rosenberg touched on these additional matters in his conversation with WJZ's Ann Kellan. All that survives

is the final videotape of the news story as broadcast. Any other statements preserved on tape presumably wound up on the editing room floor.

The fair reporting privilege reaches not only comprehensive accounts of judicial proceedings, but accounts focusing more narrowly on important parts of such proceedings. See, e.g., Bowie, supra, 154 Md. 604 (report of judge's charge to grand jury); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 254 (4th Cir 1988) (report of cross-examination testimony and bench conference); Ricci v. Venture Magazine, Inc., 574 F. Supp. 1563, 1565-67 (D. Mass. 1983) (report that accused threatened witness in courtroom); The Savage is Loose Co. v. United Artists, etc., 413 F. Supp. 555,

560-561 (S.D.N.Y., 1976) (report of allegations made in a complaint); Mark v. Seattle Times, 96 Wash.2d 473, 635 P.2d 1081 (1981), cert. denied, 457 U.S. 1124 (1982) (reports based on criminal information and affidavit of probable cause).

Rosenberg's testimony constituted a major portion of the hearing before Judge Jacobson. His testimony related to both the visitation order and the contempt motion pending before the trial court. The transcript of his testimony is 50 pages long. Mrs. Helinski, the only other witness at the hearing, answered four questions on direct examination and was then briefly questioned by the court before undergoing a short cross-examination; her testimony's transcript is 6 pages long. Rosenberg's comments to the T.V. crew, then, addressed the most significant substance of the

hearing. His report was not unfair in respect to what he said.

Nor do we find Rosenberg's statements unfair in respect to what he did not say. His out-of-court comments reporting his own testimony, to the exclusion of other matters, did not result in a materially misleading account of the hearing. The other aspects of the hearing were collateral to the defamatory gist of his report. The trial court's decision to hold Mrs. Helinski in contempt sprang from her defiance of a court order. The ruling existed apart from Rosenberg's testimony identifying Helinski as a child abuser; and the contempt citation of the mother certainly did not lessen the defamatory sting of that testimony. Indeed, a report of the mother's motives for inviting the court's displeasure - her wish to protect Jackie from further abuse - might have

multiplied the damage to Helinski's reputation.

Judge Jacobson's order that both of the Helinskis undergo psychological testing did not exculpate the father from the charges leveled against him. The ordinary person would understand the order to be part of the trial court's efforts to evaluate the emotional health and stability of the parties before venturing to devise a visitation schedule. A report that the father's visitation rights had been suspended pending the outcome of the tests would only have confirmed the inherently defamatory message that he posed a danger to the child.

Finally, Rosenberg had no duty to report that the trial court believed Helinski innocent of child abuse. Such a report would have been incorrect. The trial court at the August 20 hearing expressly reopened the July 26

hearing, and amended its earlier order. Judge Jacobson stated at the second hearing that he was not convinced that Helinski had caused Jackie's sexual injury. The court declared it did not know the source of Jackie's injuries. It described Rosenberg's testimony as "very potent." Judge Jacobson then suspended the father's visitation rights and ordered that he be evaluated by a psychologist. The judge largely adopted Rosenberg's recommendations as to future steps. The court noted that some danger to the child existed, and that it could not predict whether Helinski would be permitted to reestablish a parental relationship with the girl. These many factors reveal a trial court judge searching prudently and even-handedly for the truth. They hardly represent a judicial finding of innocence.

In sum, the parts of the hearing which Rosenberg did not address were of little or no consequence to the defamatory import of his statements to the T.V. camera. His choices regarding what to say and what to leave unsaid were those "reasonably to be expected in abbreviation" of the entire proceeding. Pulvermann v. A. S. Abell Co., 228 F.2d 797, 803 (4th Cir. 1956). His synopsis of the hearing was fair in that "the overall impression created by the summary was no more defamatory than that created by the original." Brown & Williamson Tobacco Corp. v. Jacobson, 713 F.2d 262, 270 (7th Cir. 1983). As we see it, a fuller report would not have somehow evened the score between harm and rehabilitation materially affecting Helinski's reputation. Rosenberg accurately and fairly reported his witness' testimony.

C. The self-reported statement exception.

The Restatement commentary adds one final reservation to the fair reporting privilege: "A person cannot confer this privilege upon himself by making the original defamatory publication himself and then reporting to other people what he had stated. This is true whether the original publication was privileged or not." Restatement (Second) of Torts, Sec. 611, comment c. At first blush, this comment would appear to appear to apply to Rosenberg's situation, and defeat his claim to the privilege. Upon closer analysis of the pertinent authorities, however, we find that this exception does not apply in the instant case.

The question of privileged self-reported statements is one of first impression in this Court.[5] The Restatement offers no

case law in support of its blanket denial of the privilege to those persons who report their own defamatory statements made during a court proceeding. The commentary quoted above does not appear in either of the two tentative draft versions of Sec. 611 produced before the current, published text. See, Restatement (Second) of Torts, Sec. 611 (Tentative Draft No. 20, 1974) and Id. (Tentative Draft No. 21, 1975). The decision to include the commentary was made after a brief discussion at a meeting of the American Law Institute, during which one participant called the proposed comment, "a flat contradiction of the black letter" law as set forth in Sec. 611. See, 52 A.L.I. Proceedings 188 (1976).

(footnote)

[5]The Court came near to this

question in the case of Adams v. Peck, supra, 288 Md. at 1. There, the defendant-psychiatrist sent a letter to a lawyer litigating a domestic dispute; the letter stated the psychiatrist's opinion that the plaintiff-father had abused one of his children and urged that all visitations stop. The letter to the attorney was deemed to be directly related to a judicial proceeding, and thus absolutely privileged. The Court then alluded to an allegation that the defamatory statement was published again in a non-privileged forum. Id. at 9, n. 2., concluding that the issue of the second publication was not properly preserved for appellate review, we

did not reach it.

The commentators and cases interpret Sec. 611 as conferring protection upon any persons who do not act maliciously by commencing judicial proceedings in bad faith and then later repeating their own defamatory statements under the aegis of privilege. Professors Harper, James and Gray put it succinctly:

> "The privilege should certainly not be recognized when the occasion for invoking it appears to have been fabricated. The defamer who makes the original statement in a privileged setting should not be shielded by a reporting privilege in repeating it himself outside that setting. Nor should the privilege be recog-

nized for the reporting of statements that were made in spurious circumstances, devised primarily to provide a pretext for the claim of the privilege."

2 Harper, et al., Law of Torts at 207-08. See also, Elder, Fair Report Privilege, at 171. We think this to be the better interpretation of the Restatement; the privilege will be forfeited only if the defamer illegitimately fabricated or orchestrated events so as to appear in a privileged forum in the first place. That is the true danger against which the self-reported statement exception must guard.

This view is consistent with the relatively few cases dealing with self-reported statements. The Court of Appeals of New Mexico has observed that the exception is obviously intended to prevent abuse of

the fair report privilege by, for example, a person who brings suit not with the aim of pursuing the purported legal objective, but to cause harm to another by pleading or announcing defamatory matter in court and then using the protective shield of the privilege to republish the defamatory matter to the world. Stover v. Journal Pub. Co., 105 N.M. 291, 731 P.2d 1335, 1339 (1985), cert denied, 484 U.S. 897 (1987). The Supreme Court of Arizona has held that this exception to the fair report privilege envisions "the speaker who by design uses the privilege to republish defamation he previously made during the public proceeding." Green Acres Trust v. London, 141 Ariz. 609, 688 P.2d 617, 626 (1984) (emphasis added). The Court of Appeals of New York has determined that the state's statutory privilege does not protect a person who maliciously institutes a judicial

proceeding alleging defamatory charges and then circulates a press release or other communication based thereon. Williams v. Williams, 23 N.Y..2d 592, 246 N.E.2d 333, 337 (1969).

It is clear that the exception made for self-reported statements aims to deter thcse persons who, acting out of a corrupt defamatory motive, abuse the privilege accorded to fair and accurate reports of judicial proceedings. There is not the remotest indication in the record that Dr. Rosenberg sought in bad faith to testify at the domestic hearing with some perverse wish to harm Mr. Helinski afterwards by trumpeting defamatory matter to a television audience. To the contrary, he was engaged as an expert witness in the field of child psychology. He testified in that capacity, bound by his professional

obligaitons to offer his best judgment. He had no personal stake in the outcome of the hearing. As he left the courthouse, he was approached by a T.V. news reporter and, in response to her questions, he then accurately and fairly recounted the substance of his testimony in court. In these circumstances, to deny the privilege to a witness reporting his own testimony, while the privilege is available to any other court spectator later reccunting that same testimony, would defy logic.

iv

It should be acknowledged once more that Rosenberg's remarks to the television camera were defamatory in nature. However, those remarks conveyed a substantially fair and accurate report of the judicial hearing in which the psychologist had taken part as a witness. His statements thus

enjoyed a qualified or special privilege protecting him from liability. For the reasons we have delineated, the law permits Rosenberg to tell others what happened in court that day. The public's right to know the business of its courts takes precedence in this case.

JUDGMENT REVERSED, COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY THE RESPONDENT.

IN THE

COURT OF APPEALS

OF MARYLAND

SEPTEMBER TERM 1992

NO. 25

LEON A. ROSENBERG, PETITIONER

v.

RONALD R. HELINSKI, RESPONDENT

MOTION FOR RECONSIDERATION

FILED BY

RESPONDENT

Herbert Burgunder, Jr.

Richard H. James

1740 E. Joppa Road, Baltimore, Md. 21234

Attorneys for the Respondent

The Court of Appeals agreed to Cert. in this case, a defamation action, following a Court of Special Appeals remand in a Summary Judgement Motion.

The main issue was - did the testimony of psychologist Leon Rosenberg deserve a privilege status when repeated outside the courtroom to a T.V. reporter.

The Court found: 1) That Rosenberg's three statements on filmed T.V. defamed the father, Helinski; 2) That Rosenberg was negligent in evaluating the father as a child abuser; 3) The Rosenberg statements "branded Helinski as a man who committed an act reviled by society" and "inflicted grave harm to his reputation."

The Court's opinion, of course, rightfully held that what Rosenberg said <u>in</u> court was absolutely privileged under Maryland law.

The Court further held, however, that "given the circumstances in which he spoke Rosenberg enjoyed a legal privilege to defame." According to the Opinion, accepting the "agency rational" as the basis for granting Rosenberg a Conditional Privilege, citing additionally, Restatement of Torts (2nd), Section 611.

Restatement 611 states that to claim the privilege, the recounting should be "fair, accurate and complete." Under comment (c), the privilege is not properly claimed if the person recounting is the witness who testified. The Court found that the self-reporting exception does not apply here.

The Respondent Helinski submits that there is ample evidence that the Rosenberg Statements were not complete and therefor not "fair" and that this evidence and numerous facts relative to the "public" nature of the

"occasion" should have been questions for a jury on remand.

In Batson v. Shiflett, 325 Md. 671, 602 A.2d 1191 this Court (Karwacki, J.), stated:

"The reports, though they need not be verbatim, must be substantially correct and not garbled or partial, and made bona fide or without malice. Whether a report is fair and accurate is a question of fact for the jury." (Underlining supplied.)

There is a major factor that was bypassed or overlooked in connection with a determination of the respective "rights" of the public to be kept advised of judicial hearings and those of a private person to protect his good name and reputation. The U.S. Supreme Court has emphasized several times that it is the State Courts which have the duty to protect and preserve the reputations of its citizens.

In Dun and Bradstreet v. Greenmoss Builders, Inc., 105 S.Ct. 2939 (1985), (Justice Powell), in recognizing that private victims generally lack effective opportunities for rebutting defamatory statements, stated:

"To make this determination x x we must employ the approach approved in Goertz and balance the States' interest in compensating private individuals for injury to their reputation against the First Amendment interest in protecting this type of expression. This States' interest is identical to the one weighed in Goertz. There we found that it was strong and legitimate. A State should not lightly be required to abandon it."

Justice Stewart also reminded us in Rosenblatt v. Baer, 383 U.S. 75 (1966):

"The individual's right to the

protection of his good name reflects no more than our basic concept of the essential dignity and worth of every human being, a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States, under the Ninth and Tenth Amendments."

In Malkovich v. Loraine Journal Co., 110 S.Ct. 2695 (1990), the Court stated:

"There is the other side of the equation we have regularly acknowledged the important social values which underlie the law of defamation."

The Supreme Court, whose primary interest in these types of cases is lodged in the First Amendment, "free speech" area, has plainly and very frequently reminded the individual State Courts that it is their plain primary duty to protect the

reputation and good name of the defamed. The "balance" in the Helinski case should be considered heavily in favor of the Respondent. Calling an innocent man a "pedophile" to be telecast to thousands, is a cruel and deliberate defamation. The case should be remanded for jury trial.

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Attorneys for the
Respondent

CERTIFICATION

OF SERVICE

We hereby certify that a copy of the within Motion for Reconsideration was mailed by regular mail to William F. Ryan, Jr., Esq., c/o Whiteford, Taylor and Preston, 7 St. Paul Street, Suite 1400, Baltimore, Maryland, 21202, this day of January, 1993.

_____

_____

Herbert Burgunder, Esq.

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Attorneys for Respondent

LETTER: COURT OF APPEALS OF MARYLAND

January 20, 1993

Richard H. James, Esq.

Herbert Burgunder, Jr., Esq.

1740 E. Joppa Road

Baltimore, Md. 21234

Re: Leon A. Rosenberg v. Ronald R. Helinski, September Term 1992

Dear Mr. Burgunder:

Please be advised that the motion for reconsideration filed in the above entitled case was denied by the Court on January 20, 1993.

A copy of the mandate in enclosed herewith.

Very truly yours,

Clerk

ALC/jlh

cc: William F. Ryan, Jr., Esq.

Howard R. Feldman, Esq.

LEON A. ROSENBERG

v.

RONALD R. HELINSKI

IN THE

COURT OF APPEALS

OF MARYLAND

NO. 25

SEPTEMBER TERM 1992

M A N D A T E

TO THE HONORABLE THE JUDGES OF THE

COURT OF SPECIAL APPEALS OF MARYLAND:

WHEREAS the case of Ronald R. Helinski v. Leon A. Rosenberg came before you and wherein the judgment of the said Court of Special Appeals was duly entered on the 29th day of January, 1992 as appears from the transcript of the record of the said Court of Special Appeals which was brought

into the Court of Appeals by virtue of a writ of certiorari dated June 15, 1992; and

WHEREAS in the September Term, 1992 the said cause was submitted to the Court of Appeals of Maryland;

ON CONSIDERATION WHEREOF, it was ordered and adjudged on December 14, 1992 by this Court that the judgment of the Court of Special Appeals be reversed. Costs in this Court and in the Court of Special Appeals to be paid by respondent.

NOW, THEREFORE, THIS CAUSE IS REMANDED to you in order that such proceedings may be had in the cause in conformity with the judgment of this Court as accord with right and justice, and the Constitution and laws of Maryland, the said writ notwithstanding.

WITNESS The Honorable Robert C. Murphy, Chief Judge of the Court of Appeals of Maryland, this 20th day of January, 1993.

_____

Clerk

Court of Appeals of Maryland

COSTS:	
Record	$50.00
Steno Charges	140.00
Petition Filing Fee	30.00
Printing Brief for Appellant	360.00
Reply Brief	91.20
Appearance Fee - Appellant	10.00
Filing Fee on Appeal (Court of Spec. Appeals)	50.00
Printing Brief for Appellee	148.80
Appearance Fee - Appellee	10.00
TOTAL COSTS	$890.00

Supreme Court, U.S.
FILED
JUN 9 1993
OFFICE OF THE CLERK

No. 92-1792

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

RONALD R. HELINSKI,
Petitioner,

v.

LEON A. ROSENBERG,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

---

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals of Maryland's application of the qualified privilege for out-of-court statements (made in response to questions by the media) which fairly and accurately repeated what was said moments earlier during an in-court, public proceeding raises a federal question which either can or should be reviewed by this Court under 28 U.S.C. § 1257?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1792

RONALD R. HELINSKI,

Petitioner,

v.

LEON A. ROSENBERG,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Leon A. Rosenberg, respectfully requests that this Court deny the Petition for Writ of Certiorari.

OPINIONS BELOW

The Opinion of the Court of Appeals of Maryland is reported at 328 Md. 664, 616 A.2d 866 (1992) and is reproduced in Petitioner's Appendix commencing at page 63A. The decision of the Court of Special Appeals of Maryland is reported at 90 Md. App. 158, 600 A.2d 882 (1992) and is reproduced in Petitioner's Appendix commencing at page 19A. The decision of the Circuit Court for Baltimore City, granting summary judgment in favor of Respondent, is reproduced in Petitioner's Appendix commencing at page 1A. References to the opinions below shall be to the appropriate page of Petitioner's Appendix and designated as "Pet. App. ——."

JURISDICTION

Contrary to the dictates of Supreme Court Rule 14, the Petition for Writ of Certiorari fails to show the statutory provision believed by Petitioner to confer on this Court jurisdiction to review the judgment in question. Petitioner presumably invokes jurisdiction under 28 U.S.C. § 1257 because he requests this Court to review the judgment of a state court. As discussed below, § 1257 does not support jurisdiction here because the judgment below is not based upon the resolution of a federal question but rather rests upon nonfederal grounds involving the application of state common law.

STATUTORY PROVISION

28 U.S.C. § 1257:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.
>
> (b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

STATEMENT OF THE CASE [1]

This defamation case arises out of well-publicized child custody proceedings in the Circuit Court for Baltimore

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[1] Respondent presents his own Statement of the Case primarily because he does not believe that Petitioner's Statement of the Case fully and accurately reflects the underlying facts and the decision of the Court of Appeals of Maryland. *See* Sup. Ct. R. 15.1.

County, Maryland between Jacqueline Helinski ("Mrs. Helinski") and Petitioner Ronald R. Helinski ("Petitioner" or "Mr. Helinski") regarding Petitioner's rights of visitation with their then two-year old daughter, Jackie. Believing that Jackie had been abused sexually by Mr. Helinski, Mrs. Helinski opposed Mr. Helinski's request for unsupervised visitation. At a hearing on July 26, 1985, the circuit court entered a judgment of divorce and, as part of that decree, awarded unsupervised visitation rights to Mr. Helinski. Mrs. Helinski immediately filed a motion to amend the visitation provisions of the divorce decree. When Mrs. Helinski refused to allow Mr. Helinski to have unsupervised visitation with Jackie before resolution of her motion to amend the July 26 Order, Mr. Helinski filed a petition to have her held in contempt for failing to comply with the visitation order. A hearing was held on August 20, 1985, at which time the court "in effect, reopened the hearing of July 26 in order to reconsider the question of visitation, and thereby addressed for a second time the allegations of sexual abuse along with the new issue of contempt." Pet. App. 67A-68A.

At the August 20 hearing, Mrs. Helinski presented the testimony of Respondent Leon A. Rosenberg, Ph.D. ("Respondent" or "Dr. Rosenberg"), a child psychologist and Director of Psychological Services, Division of Child Psychiatry at Johns Hopkins University School of Medicine. Jackie's pediatrician had referred Mrs. Helinski and Jackie to Dr. Rosenberg in early August 1985 for the purpose of conducting a psychological evaluation of the child.

During the August 20 court hearing, Dr. Rosenberg testified about his findings and conclusions that the child had undergone a painful and frightening experience involving sexual abuse by her father. Dr. Rosenberg recommended to the court that Mr. Helinski's visitation rights be suspended until Mr. Helinski received psychological

examination and counseling. The court followed Dr. Rosenberg's recommendations. Pet. App. 105A.

News reporters and sketch artists from the print and electronic media were present during the August 20 hearing. They took notes and drew pictures of Dr. Rosenberg and other participants in the judicial proceeding. Following the hearing, Dr. Rosenberg left the courthouse with the presiding judge and both were approached on the courthouse steps by the reporters covering the judicial proceeding. The judge told the reporters that he could not speak about the child custody case, but told them that Dr. Rosenberg could answer their questions. Responding to questions by a television reporter, Dr. Rosenberg made three statements which, as determined by the Court of Appeals of Maryland, "accurately and fairly recounted the substance of his testimony in court." Pet. App. 114A. These statements were interspersed by the television news station throughout a news story of the hearing broadcast during that evening's newscasts. As pointed out by the Court of Appeals of Maryland, "Rosenberg insists, Helinski concedes, and we agree that the psychologist's three remarks on the courthouse steps essentially repeated what he had said earlier as a witness during the hearing itself." Pet. App. 98A. Additionally, as also stated by the Court of Appeals, "[t]he record is barren of any evidence suggesting that Dr. Rosenberg acted maliciously in evaluating Jackie and subsequently reporting his conclusions to the court and the television news team." Pet. App. 92A.

Asserting that the statements of Dr. Rosenberg broadcast on the news reports were defamatory, Mr. Helinski filed this action. After the discovery process, Dr. Rosenberg moved for summary judgment on the ground, *inter alia*, that the alleged defamatory statements were conditionally privileged and therefore not actionable because there was no evidence that Dr. Rosenberg acted with malice or with any intent to cause harm to Mr. Helinski. Finding that "no evidence [was] presented or proffered

in this proceeding that would entitle the jury to be convinced by any evidentiary standard . . . that Dr. Rosenberg, the Defendant, acted with malice or had reason to know of any falsity," Pet. App. 7A-8A, and recognizing that the alleged defamatory statements were matters of public concern which accurately recounted to the press public testimony already given in an open judicial proceeding, the circuit court granted summary judgment in favor of Dr. Rosenberg. Pet. App. 1A-18A. The Court of Special Appeals of Maryland, the state's intermediate appellate court, reversed the summary judgment. Pet. App. 19A-62A.

The Court of Appeals of Maryland granted Dr. Rosenberg's petition for writ of certiorari and reinstated the judgment of the trial court solely on the ground that Dr. Rosenberg's statements enjoyed a qualified privilege because they "conveyed a substantially fair and accurate report of the judicial hearing in which the psychologist had taken part as a witness," Pet. App. 114A, and because there was nothing in the record to suggest that Dr. Rosenberg abused the privilege recognized for such reports.[2] While the Court recognized that Dr. Rosenberg offered "three independent theories triggering a malice standard: 1) that his statements were subject to the so-called fair report privilege; 2) that his statements addressed a matter of public concern, child abuse; [and] 3) that his statements discussed a person, Mr. Helinski, so steeped in controversy as to be a public figure," the Court decided there was "no need to reach the second and third of these points." Pet. App. 82A.[3]

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[2] The Court of Appeals also held that the "self-reported statement" exception to the fair report privilege (as described in Restatement (Second) of Torts § 611 cmt. c (1977)) was inapplicable because there was "not the remotest indication in the record that Dr. Rosenberg sought in bad faith to testify at the domestic hearing with some perverse wish to harm Mr. Helinski . . . ." Pet. App. 113A.

[3] In this regard, Petitioner's Brief, at page 8, incorrectly states that the Court of Appeals agreed that the Helinski child custody

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS OF MARYLAND'S APPLICATION OF THE QUALIFIED PRIVILEGE FOR OUT-OF-COURT STATEMENTS (MADE IN RESPONSE TO QUESTIONS BY THE MEDIA) WHICH FAIRLY AND ACCURATELY REPEATED WHAT WAS SAID MOMENTS EARLIER DURING AN IN-COURT, PUBLIC PROCEEDING IS NOT A FEDERAL QUESTION AND DOES NOT CONFLICT WITH DECISIONS OF THIS COURT, OTHER STATE COURTS OF LAST RESORT OR UNITED STATES COURTS OF APPEALS

A. Absent Restriction On Free Speech Violative Of The First Amendment, The Law Of Defamation, Including The Recognition And Application of Privileges, Is A Matter Of State Common Law.

In pertinent part, 28 U.S.C. § 1257(a) provides: "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . of . . . the United States." *See also* Sup Ct. R. 10.1. In this case, the judgment below is not based upon a right, privilege or immunity specially set up or claimed under the Constitution of the United States. Rather, the sole ground for the decision of the Court of Appeals of Maryland, application of the fair report privilege, rests upon that court's interpretation of Maryland common law. Separate constitutional issues relating to Mr. Helinski's status as a public figure and to the characterization of the Helinski child custody dispute as a matter of public con-

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dispute was not a matter of public concern. Additionally, contrary to Petitioner's assertion at page 11 of his Brief, the Court of Appeals did ~~not~~ "decide" that Dr. Rosenberg acted negligently but rather merely "assume[d], without deciding, that Rosenberg acted negligently in evaluating Jackie and in communicating the results of his examination." Pet. App. 85A-86A. Similarly, the Court only assumed such negligence, if any, caused harm to Mr. Helinski. *Id.* at 86A.

cern were not decided by the Court of Appeals. Pet. App. 82A.

The tort of defamation is founded on the state interest of providing individuals a means to be compensated "for the harm inflicted on them by defamatory falsehood." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974); *see also Linn v. United Plant Guard Workers Local 114*, 383 U.S. 53, 63-64 (1966) (". . . state remedies have been designed to compensate the victim and enable him to vindicate his reputation."); *Hearst Corp. v. Hughes*, 297 Md. 112, 127, 466 A.2d 486, 493 (1983) (recognizing defamation as the tort aimed at protecting individuals' interests in their reputation); 2 Fowler V. Harper, *et al.*, *The Law of Torts* § 5.1 (2d ed. 1986). Subject to First Amendment protections in favor of free speech, state law generally determines whether a claim for defamation will lie and what elements need be proven in order for a plaintiff to recover in any given case. *See, e.g., Lapkoff v. Wilks*, 969 F.2d 78, 81 (4th Cir. 1992) (applying law of the state in which alleged defamation occurred).

Likewise, state law generally determines what, if any, privileges protect the publisher of statements which are alleged to be defamatory. *See, e.g., Arochem Int'l, Inc. v. Buirkle*, 968 F.2d 266, 269-71 (2d Cir. 1992); *General Elec. Co. v. Sargent & Lundy*, 916 F.2d 1119, 1127 (6th Cir. 1990); *Johnston v. Cartwright*, 355 F.2d 32, 35-36 (8th Cir. 1966) (Blackmun, J.); *De Ronde v. Gaytime Shops, Inc.*, 239 F.2d 735, 738 (2d Cir. 1957).[4]

In Maryland, the recognition of a privilege is premised on the notion that an otherwise defamatory statement is

[4] Thus, federal courts are compelled to apply the fair report privilege if governing state law recognizes the privilege. *See, e.g., Dorsey v. National Enquirer, Inc.*, 973 F.2d 1431, 1434 (9th Cir. 1992) (applying Cal. law); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 254-55 (4th Cir. 1988) (applying Va. law); *Ronwin v. Shapiro*, 657 F.2d 1071, 1075-76 (9th Cir. 1981) (applying Ariz. law); *Schuster v. U.S. News & World Report, Inc.*, 602 F.2d 850, 854 (8th Cir. 1979) (applying Minn. law); *see also Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 38 (1971) (pointing out that fair report privilege is recognized under Pennsylvania law).

not actionable "if publication of the utterance advances social policies of greater importance than the vindication of a plaintiff's reputational interest." *Marchesi v. Franchino*, 283 Md. 131, 135, 387 A.2d 1129, 1131 (1978); *accord Mareck v. Johns Hopkins Univ.*, 60 Md. App. 217, 224, 482 A.2d 17, 21 (1984), *cert. denied*, 302 Md. 288, 487 A.2d 292 (1985); *see generally* 2 Harper, *supra*, § 5.25 (discussing policy factors behind privileges). Following well-settled law, the Court of Appeals of Maryland determined in this case that, as a matter of Maryland law and public policy, "[t]he public's right to know the business of its courts takes precedence in this case." Pet. App. 115A.[5]

Petitioner's contention that the judgment below raises an issue under the First Amendment of the United States Constitution is incorrect. The holding of the Court of Appeals places no imposition on free speech. Indeed, recognition of the fair report privilege fosters free speech. Review of this case by this Court would be appropriate only if the fair report privilege placed "invalid restrictions on . . . constitutional freedoms of speech and press." *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964). This case presents the opposite; the fair report privilege stimulates these constitutional freedoms.

B. The Fair Report Privilege, Upon Which The Judgment Below Is Based, Is A Widely Recognized Means Of Protecting Fair And Accurate Reports Of Judicial Proceedings And Does Not Conflict With Decisions Of This Court, Other State Courts Of Last Resort, Or United States Courts Of Appeals.

In this case, the Court of Appeals of Maryland described the important policy reasons behind the fair report privilege:

> Any one of three theories may serve as a rationale for granting a privilege to such reports of events in

[5] In reaching this decision the Court of Appeals also recognized that the fair report privilege is not limited to the press, but extends to any person who reports on judicial proceedings. Pet. App. 96A.

> court: 1) the agency rationale, by which the reporter acts as agent for an otherwise preoccupied public which could, if it possessed the time, energy or inclination, attend the proceedings; 2) the public supervision rationale, by which the reporter provides to the larger community data it needs to monitor government institutions; 3) or the public information rationale, by which the reporter provides information affecting the greater public welfare. . . . While each of these theories might arguably serve in this case, the agency rationale is clearly applicable. Rosenberg acted as a conduit between the courtroom and the world at large. He recounted events at a judicial hearing, entirely open to the public, that any members of the community might have seen and heard for themselves.

Pet. App. 94A-96A; *see generally* David A. Elder, *The Fair Report Privilege*, §§ 1.00A, 1.01 (1988).

As in Maryland, the fair report privilege is recognized by many states and leading commentators as a means of assuring that fair and accurate reports of judicial (or any other government) proceedings are protected. *See* Elder, *supra*, § 3.01 (presenting state-by-state analysis of fair report privilege with case citations); *see also* 2 Harper, *supra*, § 5.24; W. Page Keeton, *et al.*, *Prosser and Keeton On The Law of Torts* § 115, at 836 (5th ed. 1984); Restatement (Second) of Torts § 611 (1977).[6]

Moreover, the public policies behind the fair report privilege are consistent with analogous decisions of this Court. In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court stated that " '[a] trial is a public

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[6] Petitioner's apparent reliance on *Yerkie v. Post-Newsweek Stations, Mich., Inc.*, 470 F. Supp. 91 (D. Md. 1979) for the proposition that the fair report privilege is inapplicable to this case is misplaced. In *Yerkie*, the district court held that the privilege does not apply to out-of-court statements made by the parties, counsel or witnesses to a proceeding about evidence "expected to be given which have not yet been made a part of the judicial proceeding. . . ." 470 F. Supp. at 94. Here, Dr. Rosenberg's out-of-court statements reported the content of evidence already presented in a judicial proceeding.

event. What transpires in the court room is public property.'" 420 U.S. at 492 (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947)). Accordingly, "'[t]here is no liability when the defendant merely gives further publicity to information about the plaintiff which is already public. Thus, there is no liability for giving publicity to facts about the plaintiff's life which are matters of public record . . . .'" *Id.* at 494 (citation omitted; ellipses in original); *see also Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (declaring unconstitutional a law making it a crime to publish information regarding proceedings by state judicial review commission); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978) (stating that *Cox* reaffirmed right of the press to publish accurate information contained in public court records); *Oklahoma Publishing Co. v. District Ct.*, 430 U.S. 308 (1977) (striking down injunction prohibiting disclosure of information obtained in juvenile court); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) ("Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment.").

In any event, it is clear that the fair report privilege rests on sound reasons of policy, and that invocation of the privilege is a determination that should be left to state law.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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